

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL BRIAN DASILVA,

CASE NO. 14cv2442 WOH (MDD)

Plaintiff ORDER

PADILLA et al.,

Defendant.

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 49) issued by United States Magistrate Judge Mitchell D. Dembin.

I. Background

On October 10, 2014, Plaintiff, a state prisoner proceeding *pro se*, initiated this action by filing a lawsuit in this Court based on civil rights violations pursuant to 42 U.S.C. § 1983. (ECF No. 1). On October 10, 2014, Plaintiff filed a motion for leave to proceed in forma pauperis. (ECF No. 2). On December 2, 2014, the Court granted Plaintiff's motion to proceed in forma pauperis. (ECF No. 4). On April 28, 2015, Plaintiff filed a first amended complaint which became the operative pleading in this case. (ECF No. 35).

On May 12, 2015, Defendants filed the motion to dismiss. (ECF No. 37). On June 1, 2015, Plaintiff filed an opposition to the motion to dismiss. (ECF No. 41). On June 11, 2015, Defendants filed a reply. (ECF No. 42).

28 On October 7, 2015, Magistrate Judge Mitchell D. Dembin issued the Report and

1 Recommendation. (ECF No. 49). The Magistrate Judge recommends that the Court
 2 grant Defendants' partial motion to dismiss, and dismiss Plaintiff's first claim for denial
 3 of access to courts against Defendants Erece, Greenwood, Miller, Rivas, Ruiz, and Sais;
 4 Plaintiff's second and fourth claims against Defendant Gervin for retaliation; and
 5 Plaintiff's third claim for denial of Due Process against Defendants Calderon,
 6 Dominguez, Gervin, Miller, Padilla, and Sais.

7 On December 2, 2015, Plaintiff filed a motion requesting a copy of the Report
 8 and Recommendation and requesting an extension of time to file objections. (ECF No.
 9 53). On December 9, 2015, the Court granted Plaintiff's request for an extension of
 10 time to file objections to the Report and Recommendation. (ECF No. 54).

11 On February 1, 2016, Plaintiff filed a motion for leave to file a second amended
 12 complaint. (ECF No. 56). In the declaration attached to the motion, Plaintiff states,

13 I am requesting leave to amend my complaint because after reviewing the
 14 R & R I would like he opportunity to correctly plead my retaliation claim
 15 against Defendant Gervin as well as the other Defendants brought under
 16 my retaliation claim . . . I do not otherwise object to this Court's Report
 17 and Recommendation as to claim one: Access to Courts, and claim three:
 18 Due Process.

Id. at 3.

19 **II. Discussion**

20 The duties of the district court in connection with a report and recommendation
 21 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28
 22 U.S.C. § 636(b). The district judge must "make a de novo determination of those
 23 portions of the report . . . to which objection is made," and "may accept, reject, or
 24 modify, in whole or in part, the findings or recommendations made by the magistrate."
 25 28 U.S.C. § 636(b). The district court need not review de novo those portions of a
 26 Report and Recommendation to which neither party objects. *See Wang v. Masaitis*, 416
 27 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
 28 (9th Cir. 2003) (en banc) ("Neither the Constitution nor the [Federal Magistrates Act]
 requires a district judge to review, de novo, findings and recommendations that the
 parties themselves accept as correct.").

1 Plaintiff does not object the Report and Recommendation. The Court has
2 reviewed the Report and Recommendation, the record, and the submissions of the
3 parties. The Court concludes that the Magistrate Judge correctly recommended that
4 Defendants' partial motion to dismiss be granted. The Report and Recommendation is
5 adopted in its entirety.

6 **III. Conclusion**

7 **IT IS HEREBY ORDERED** that the Report and Recommendation (ECF No. 49)
8 is adopted in its entirety. Defendants' partial motion to dismiss (ECF No. 37) is
9 granted. The Court dismisses Plaintiff's first claim for denial of access to courts by
10 withholding mail against Defendants Erece, Greenwood, Miller, Rivas, Ruiz, and Sais,
11 Plaintiff's second and fourth claims against Defendant Gervin, and Plaintiff's third
12 claim for denial of Due Process against Defendants Calderon, Dominguez, Gervin,
13 Miller, Padilla, and Sais arising out of the denial of law library access, denial and
14 cancellation of grievances, property deprivation, and prison transfer.

15 Plaintiff's remaining claims include Plaintiff's second claim for denial of the
16 right to petition the government for redress of grievances against Defendants Calderon,
17 Dominguez, Greenwood, Miller, Padilla, Rivas, and Sais, Plaintiff's third claim for
18 violation of Due Process against Defendants Erece, Greenwood, Ruiz, and Sais arising
19 from the withholding of Plaintiff's legal mail, Plaintiff's fourth claim for retaliation
20 against all Defendants except Gervin, and Plaintiff's fifth claim alleging violations of
21 state laws.

22 DATED: February 8, 2016

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24 **WILLIAM Q. HAYES**
25 United States District Judge
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